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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-898

NORVAL GOSS, et al.,

Appellants,

v.

EILEEN LOPEZ, et al.,

Appellees.

ON APPEAL FROM A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AMICI CURIAE IN SUPPORT OF THE DECISION BELOW

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OPINION BELOW

The opinion below is contained in Appellants' Jurisdictional Statement at 20 (Appendix B).

JURISDICTION

The jurisdiction of this Court to review the judgment below is invoked pursuant to 28 U.S.C. § 1253. The Court noted probable jurisdiction on February 19, 1974. 42 U.S.L.W. 3468.

CONSENT OF THE PARTIES

The National Association for the Advancement of Colored People and the Southern Christian Leadership Conference file this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

QUESTION PRESENTED

Whether the court below was correct in holding that the exclusion of Ohio students from public school for up to ten days without *any* form of fact-finding hearing or conference was a violation of the Due Process guarantees of the Fourteenth Amendment to the United States Constitution?

INTEREST OF *AMICI CURIAE*

The National Association for the Advancement of Colored People (NAACP) and the Southern Christian Leadership Conference (SCLC) are nonprofit membership associations representing the interests of more than 500,000 members throughout the United States. For many years both amici have sought through the courts to establish and protect the civil rights of minority citizens. In this respect, NAACP and SCLC have appeared often before this Court as amici in cases involving school desegregation, employment, voting rights, jury selection, capital punishment, and other cases involving fundamental human rights.

The present case is of particular importance to amici because it centers around the role and responsibility of a state to assure that the rights of minority children, as enunciated by this Court twenty years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), are in fact given the paramount attention that they were accorded at that time.

Amici believe that the duty of school officials to provide school disciplinary procedures which comply with the Fourteenth Amendment is no less important than the duty of school officials to assure meaningful desegregation, because discriminatory application of school discipline can seriously undermine the commitment to desegregation and equal educational opportunities for minority students.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in Appellees' Brief on the Merits.

ARGUMENT

This case involves the sweeping and indiscriminate suspension of Black students[1] from Columbus, Ohio public schools for allegedly taking part in demonstrations which occurred following the observance of "Black History Week." Although the facts relating to the schools' charges of misconduct were *very* much in dispute, the principals suspended these students without affording them a hearing or any opportunity to present their account of the events.

Amici are filing this Brief because the legal issues presented here are of extreme importance to minority students throughout this country. As we will show in Part I of this Brief, there is a high, and dramatically disproportionate, incidence nationwide of school suspensions and other forms of disciplinary action against Black students. In most localities a Black is at least two or three times

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[1] While the record does not reveal the race of every student suspended, attorneys for appellees have informed amici that all nine named plaintiffs are Black.

more likely than a White to be suspended from public school.

Amici will demonstrate in Part II of their Brief that these disciplinary actions not only hit minority students more frequently than others, but also that they affect minority students more severely. This Court often has stressed the importance of education in helping to break the cycle of discrimination and deprivation that may freeze minority citizens out of their full share of rights and opportunities in our society. Disadvantaged Black children, who are uniquely dependent upon public education to achieve full equality, frequently enter school already at an academic disadvantage relative to their White classmates, and can be expected to fall further and further behind if their schooling is interrupted by unjustified suspensions. Numerous studies and data confirm that racial discrimination in the application of school discipline – especially in the context of schools encountering the stresses of the desegregation process – tends to negate that valuable effect of our educational system.

Finally, in Part III, we review the factors that this Court has held to be essential in determining the constitutional requirements of procedural due process. Weighing those factors in this case, especially considering the significant possibility of racial discrimination implicit in off-the-record, unreviewable disciplinary actions, amici respectfully urge the Court to conclude that Fourteenth Amendment principles of due process of law require state officials to hold hearings before suspending students from public schools.

I.

MINORITY STUDENTS ARE THE PRINCIPAL VICTIMS OF STANDARDLESS, UNREVIEWABLE SUSPENSIONS AND EXPULSIONS FROM PUBLIC SCHOOLS.

Countless studies and statistical reports have documented that minority students are far more likely than others to suffer the drastic punishment of suspension or expulsion from public school. Whether or not there has been conscious racial discrimination in this or any other individual case, it is clear that the vague standards and lack of due process implicit in Columbus, Ohio school disciplinary rules and procedures result in a body of essentially unreviewable decisions that strike most harshly at minority children.

In Ohio public schools a Black student is more than twice as likely as a White student to be suspended from school. Statistics available from the United States Department of Health, Education and Welfare indicate that in the 1972-73 school year 8 percent of the Black students enrolled in reporting Ohio public school districts were suspended, compared to only 3.7 percent of the White students enrolled in the same school districts.[2]

These statistics are consistent with data showing a similar disproportionate incidence of suspensions among Black students in other states. For example, during a

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[2]Form OS CR 102, 1972-73 Annual Elementary and Secondary School Civil Rights Survey (available at Office for Civil Rights, U.S. Department of Health, Education and Welfare, 330 Independence Ave., S.W., Washington, D.C. 20201).

Interestingly, 46 of the 47 school districts included in this 1973 survey provided HEW with the information requested. The *one* Ohio school district that failed to comply, claiming that the information was unavailable, was the Columbus, Ohio district!

recent period in St. Petersburg, Florida, approximately 50 percent of student suspensions were directed against Black students, although they constituted only 16 percent of the total enrollment. [3] Similarly, in Prince George's County, Maryland, a Black student is more than twice as likely as a White student to be suspended. [4] A survey by the United States Commission on Civil Rights indicates that in some school districts the disproportionate impact of suspensions on minority students may be far higher. [5]

Available statistics on expulsions show the same consistent pattern of Blacks being expelled in far higher percentages than their percentages of enrollment. In 1970-71

[3] SOUTHERN REGIONAL COUNCIL & ROBERT F. KENNEDY MEMORIAL, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION 5 (1973) [hereinafter cited as "THE STUDENT PUSHOUT"].

[4] Between September, 1973, and January, 1974, 7 percent of the Black enrollment was suspended, compared to 3 percent of the White enrollment. These figures are available from the Maryland State Board of Education, P.O. Box 8717, Baltimore, Maryland 21240.

[5] The Commission found in a survey of Southwest schools that the ratio of eighth-grade Black students who were suspended twice or more during the 1968-69 school year, compared to Whites in the same category, was four-to-one. School Principal Information Form, Question 46M, Mexican American Education Study, United States Commission on Civil Rights.

Amici have been advised that the Brief to be filed in the instant case by the Children's Defense Fund will contain a more detailed presentation and analysis of recent suspension data. *See generally Sweet v. Childs*, No. 73-3842, 5th Cir., Appellants' Brief at 42 (Jackson County, Fla.: 4-1 ratio); THE STUDENT PUSHOUT 5 (Tampa, Fla.: 2.5-1 ratio); *id.* at 2 (Little Rock, Ark.: 2-1 ratio); Bell, *Race and School Suspensions in Dallas*, 62 INTEGRATED EDUCATION 66 (March-April 1973) (approximately 2-1 ratio); Clarke, *Race and Suspensions in New Orleans*, 63 INTEGRATED EDUCATION 30 (May-June 1973) (same).

the expulsion rate for Black students was *three times* the rate for non-minority students in the 1,226 reporting school districts across the country. Office for Civil Rights, U.S. Department of Health, Education and Welfare, Elementary and Secondary School Civil Rights Survey (1970-71). [6]

The likely explanation of the foregoing statistical disparities is that disproportionate Black suspensions are a consequence of racial discrimination and the tensions attendant to massive desegregation. [7] Suspensions have risen dramatically immediately following integration in school districts throughout the country. [8] Moreover, in

[6] *See also* THE STUDENT PUSHOUT 4, 7; AMERICAN FRIENDS SERVICE, YOUR SCHOOLS: SPECIAL REPORT 14-15 (April 1974).

[7] Numerous cases have held that statistical disparities such as these can constitute prima facie evidence of racial discrimination. For example, in *Turner v. Fouche*, 396 U.S. 346 (1970), this Court held that the "substantial disparity between the percentages of Negro residents in the county as a whole [60%] and of Negroes on the newly constituted jury list [37%] . . ." was prima facie evidence of racial discrimination. *See also Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *Alabama v. United States*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962). In the instant case, it is not necessary to conclude that there is statistical evidence sufficient to prove racial discrimination. However, the statistical disparities do suggest the possibility, if not the likelihood, that suspensions are applied in a racially discriminatory manner.

[8] For example, during the first year of integration in San Francisco, California, suspensions in the sixth grade rose to 795, compared to 491 the year prior to integration. Wright, *The New Word is Pushout*, 4 RACE RELATIONS REPORTER 8, 9 (May 1973). In the Charlotte-Mecklenburg County, North Carolina school district suspensions rose from 1,544 in 1968-69 (prior to the decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 311 F. Supp. 265 (W.D.N.C.), *modified*, 431 F.2d 138 (4th Cir. 1970), *aff'd*, 402 U.S. 1 (1971), that ruled busing was a valid means of achieving desegregation) to 6,652 in 1970-71. THE STUDENT PUSHOUT 4.

prosecuting desegregation cases the Justice Department has recognized that resistance to desegregation may take the form of suspension of Blacks. The Department therefore has sought and obtained court orders expunging students' suspension and expulsion records and establishing requirements for a hearing prior to any suspension.[9] *See, e.g., United States v. Wilcox County Board of Education*, Civil No. 3934-65-H (S.D. Ala., May 15, 1973), *aff'd*, Civil No. 73-3543 (5th Cir., May 2, 1974). It has been documented that disciplinary problems are more common in integrated schools than in either all-Black or all-White schools. Havighurst, Smith & Wilder, *A Profile of the Large-City High School*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS BULLETIN 76 (January 1971).

> According to one analysis,
> conflict has provoked harsher disciplinary policies, and blacks allege that the policies are applied more rigidly and harshly to them than to white students. School administrators respond that blacks are more inclined to physical aggression, particularly as they are removed from their neighborhoods and placed in an unfamiliar, if not hostile, school environment. *See, e.g., Tillman v. Dade County School Board*, 327 F. Supp. 930 (S.D. Fla. 1971); *Blount v. Ladue School Dist.*, 321 F. Supp. 1245 (E.D. Mo. 1970).
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> . . . The frequency of disputes (including many that never reach the courts) suggests that in at least some districts educators have not sought diligently

[9]The Office for Civil Rights of the U.S. Department of Health, Education and Welfare, in its evaluation of the desegregation process in the Dallas Independent School District during the 1971-72 school year, noted the aggregate number of suspensions (17,917) as an indication that the desegregation plan was not producing the desired results. Bell, *Race and School Suspensions in Dallas*, 62 INTEGRATED EDUCATION 66, 67 (March-April 1973).

> to make integration work; it also serves as a reminder that in many parts of the country integration signals a social revolution that inevitably causes considerable dislocation and strife. [D. KIRP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW 431 (1974).]

The statistical inference that suspensions are being discriminatorily applied is reinforced by findings that teachers, particularly White teachers, perceive Black children differently from White children. A recent study of more than 50 California elementary schools, conducted by Dr. Jane Mercer, University of California at Riverside, concluded that teachers perceive Black children as being more disobedient than Whites.[10] This finding comports with earlier studies which have concluded that teachers perceive Black children more negatively than White children.[11]

The evidence that disproportionate suspensions may result from racial discrimination highlights the necessity of adequate procedural safeguards to protect minority

[10]J. MERCER, EVALUATING INTEGRATED ELEMENTARY EDUCATION: TECHNICAL MANUAL, at Table 25 (PRIME ed.1974), available from Program Research in Integrated Multiethnic Education, a General Assistance Center, University of California, Riverside, Calif., 92502.

[11] In a survey of elementary school teachers in a medium-sized industrial town in the Midwest, the Black teachers perceived their students, who were primarily low-income Black students, differently than did the White teachers. The Black teachers perceived the students as fun loving, happy, cooperative, energetic and ambitious; whereas, the White teachers perceived the students as talkative, lazy, fun loving, high strung and rebellious. Gottlieb, *Teachers and Students: The Views of Negro and White Teachers*, THE DISADVANTAGED LEARNER 437, 444 (1966). Teachers' negative perceptions of the achievement levels of Black pupils have been widely noted. Wilkerson, *Understanding the Black Child*, 46 CHILDHOOD EDUCATION 351 (April 1970); K. CLARK, DARK GHETTO 132 (1965).

students from actual discrimination and from the appearance of discrimination.[12] It is important not only that the system act fairly, but also that it be perceived as acting fairly. If the school denies them procedural safeguards, Black students may perceive that they are being discriminatorily disciplined, whether they are or not. *See, e.g.*, A. CAMPBELL & H. SCHUMAN, SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: RACIAL ATTITUDES IN FIFTEEN AMERICAN CITIES 22-26 (1968).

Since broadly worded school rules are especially susceptible of discriminatory application, a hearing is particularly important to provide protection against discriminatory application of facially neutral but vaguely worded school disciplinary policies and, just as importantly, to provide assurance to Black students that no discrimination exists.

II.

SUSPENSION FROM SCHOOL HAS A PARTICULARLY SEVERE IMPACT ON A MINORITY STUDENT.

Suspensions from public school not only affect minority students more frequently than others, but studies suggest that suspensions also result in greater educational detriment to the individual student if he or she is a member of a minority group.

Minority students, who are born economically and socially disadvantaged, are especially dependent on public education as the great equalizer by which they may aspire

[12] *See Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (emphasizing importance of procedural standards as protection against intolerance and prejudice).

to achieve greater advantages than their parents.[13] This Court has historically recognized the importance of education to racial minorities. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court observed that

> [t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. . . . [*Id* at 493.]

Underlying the entire line of public school equal protection cases is the Court's clear commitment to quality education for racial minorities. *See, e.g., Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Given the vital role of education in our society, and the dependence of racial minorities on education, an inter-

[13] It has been found that the achievement level of Black students is affected to a greater extent by the quality of public schooling they receive than is the achievement of Whites. OFFICE OF EDUCATION, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 22, 297 (1966) [hereinafter cited as "COLEMAN REPORT"]. The "indirect evidence suggests that it is those children who come least prepared to school, and whose achievement in school is generally low, for whom the characteristics of a school make the most difference." *Id.* at 297.

ruption of the educational process for even a few days may produce permanently harmful consequences. It has been widely documented that Black children generally are at an academic disadvantage when they enter the first grade. *See, e.g.*, COLEMAN REPORT 21, 275, 297; C. JENCKS, *et al.*, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972) [hereinafter cited as "JENCKS, INEQUALITY"]. They also fall further behind their White classmates in the critical skills of reading and verbal ability with each year of school.[14] COLEMAN REPORT 20-21. For the minority student, who is already at an academic disadvantage, an unjustified suspension may be the final, crippling blow. At the very least, the loss of school time resulting from a suspension, particularly when teachers may not have the time or inclination to assist in making up work, will place the suspended student at a

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[14] "The school appears unable to exert independent influences to make achievement levels less dependent on the child's background. . . ." COLEMAN REPORT 297. The Coleman Report concludes that

> [f]or most minority groups, then, and most particularly the Negro, schools provide little opportunity for them to overcome this initial deficiency; in fact, they fall farther behind the white majority in the development of several skills which are critical to making a living and participating fully in modern society. Whatever may be the combination of nonschool factors – poverty, community attitudes, low educational level of parents – which put minority children at a disadvantage in verbal and nonverbal skills when they enter the first grade, the fact is the schools have not overcome it. [COLEMAN REPORT 21.]

This finding is confirmed by a survey of Southwest public school districts which concluded that more than twice as many Blacks as Whites read below their grade level at 4th, 8th and 12th grades. UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: THE UNFINISHED EDUCATION 24 (1971).

serious academic disadvantage. For the marginal student, the suspension may be the difference between passing grades and failing grades, between academic success and failure.

The possibility also exists that a temporary suspension may become permanent through the inertia of the student or for other reasons. *See* 22 RUTGERS L. REV. 342, 346 n.33 (1968). Even if the student returns to school on schedule, there is a tendency for suspensions to be repeated and an increased risk of eventual dropout.[15] This tendency aggravates an already serious dropout problem among Black students.[16]

When dropout occurs, the consequences for Blacks in the job market are particularly serious since Blacks are already disadvantaged by higher rates of unemployment, lower incomes, and a greater proportion of low-prestige or part-time jobs.[17] JENCKS, INEQUALITY 216 *et seq.* A

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[15] *Cf. Madera v. Board of Education*, 267 F. Supp. 356 (S.D. N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

[16] The Coleman Report found that in 1965 17% of 16-17 year old Blacks were not in school compared to 9% of Whites. COLEMAN REPORT 28. This finding is corroborated by a survey of Southwest public school districts that found that of every 100 Black children entering first grade, 99 reach the eighth grade but only 67 graduate from high school; whereas, of every 100 Whites who enter first grade, 86 finish high school. UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: THE UNFINISHED EDUCATION 10 (1971).

[17] In 1969, the median income of Black families as a percentage of White family incomes rose to the highest on record; even so, it was only 63% of median White family income, BUREAU OF LABOR STATISTICS, U. S. DEPARTMENT OF LABOR, BULL. NO. 1699, BLACK AMERICANS: A CHARTBOOK 38 (Table 16) (1971).

[footnote continued]

Black male high school graduate, from his 18th birthday through his 65th, will typically earn $76,000 more than a Black male who did not finish high school. The corresponding figure for a Black female is $73,000. THE STUDENT PUSHOUT 24.

A student suspended even temporarily, particularly one who feels that he has been suspended unfairly, is likely to become increasingly negative in his attitude toward school and toward his own educational achievement. For the Black child who enters school with a low opinion of himself and of his ability to do well, and without basic skills possessed by more advantaged children,[18] this effect on attitude is particularly severe.[19] Moreover, the suspen-

[footnote continued from preceding page]

Blacks tend to be employed in lower-status jobs than Whites. In 1970 40% of Blacks were employed as household workers, service workers, laborers, or farm workers, whereas, only 18% of Whites were so employed. *Id.* at 30 (Table 13). Moreover, in 1970 the unemployment rate among Blacks was 8.2% compared to the rate of 4.5% among Whites. *Id.* at 20 (Table 8). This difference is even greater among teenagers. Black teenagers in 1970 had an unemployment rate of 29.1%, 2.2 times that among White teenagers. *Id.* at 26 (Table 11).

[18] Wells, *The Effects of Discrimination Upon Motivation and Achievement of Black Children in Urban Ghetto Schools,* 12 AMERICAN BEHAVIORAL SCIENTIST 26 (1968-69). Educators have reported for some time that Black children in early years tend to exhibit cynicism, disinterest and hostility toward schooling. Katz, *The Socialization of Academic Motivation in Minority Group Children,* NEBRASKA SYMPOSIUM ON MOTIVATION 133 (1967).

[19] The extent to which a student feels he has some control over his own destiny has been singled out as being the primary determinant of student achievement – stronger than all of the school influences combined. This is particularly the case with racial minorities. COLEMAN REPORT 23.

> If a child feels that his environment is capricious, or random, or beyond his ability to alter, then he may

[footnote continued]

ded student suffers a loss of status and reputation among his peers and is frequently branded as a troublemaker by his teachers. This stigma affects Blacks particularly, because teachers perceive Blacks as more rebellious than Whites. *See* p. 9, *supra.* [20]

The impact of a school suspension is greatly magnified when a record is made of the action of the school authorities, as is so often the case. A suspension record can severely handicap the student in obtaining employment or admission to college. Even if a student's suspension is not recorded, or if his record is not revealed by school officials to prospective employers or colleges to which he seeks admittance, the student may often be asked to disclose any record of a suspension. This record compounds the disadvantages to which Blacks are already subject in the job market. *See* pp.13-14, *supra.*

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> conclude that attempts to affect it are not worthwhile, and stop trying. Such a response to one's environment may be quite unconscious, but merely a general attitude that has developed through long experience. The particular relevance of this factor for groups that have been the subject of discrimination is that they have objectively had much less control of their environment than have members of the majority groups. This has been particularly true for Negroes. [*Id.* at 288.]

The Coleman Report's findings were that Blacks and other minority children exhibit a much lower sense of control of their environment than do Whites. In metropolitan areas, about twice the proportion of Blacks as of Whites tend to feel they have no control over their environment. Outside the metropolitan area, the rate is about three times greater. COLEMAN REPORT 289. However, when Blacks do believe they can control their environment, "their achievement is higher than that of Whites who lack that conviction." COLEMAN REPORT 23.

[20] The stigma which results from disciplinary action was a key factor in requiring a pre-expulsion hearing in *Dixon v. Alabama*

[footnote continued]

In sum, a Black child is especially dependent on a public education to increase his opportunities to earn a living, communicate, stimulate his curiosity and interests, and enjoy cultural and social benefits. A suspension of even a few days can have serious, harmful, and permanent consequences on his academic standing, his attitude, his reputation, his likelihood of graduating from high school, and his prospects for employment.

III.

GIVEN THE STRONG INTEREST OF STUDENTS IN GENERAL, BUT PARTICULARLY MINORITY STUDENTS, IN UNINTERRUPTED EDUCATION, AND THE LIMITED BENEFITS TO THE STATE OF SUMMARY ACTION, DUE PROCESS REQUIRES A HEARING PRIOR TO A SUSPENSION FROM SCHOOL.

A. The Right to a Public Education in Ohio is a Protected Liberty and Property Interest Embraced by the Fourteenth Amendment.

Appellants have urged this Court to hold that because the United States Constitution does not explicitly guarantee the right to public education, a state is free to ignore principles of procedural due process when the state grants or withdraws the benefits of its educational system. This argument flies in the face of numerous decisions of this Court, holding that the liberty and property interests protected by constitutional principles of due process need not themselves have an independent constitutional basis.

[footnote continued from preceding page]

State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *See also Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), where this Court stated:

> Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

Appellees' Brief on the Merits ably documents that the right to a free public education in Ohio is guaranteed by state law. Ohio Const. Art. VI, §2; Ohio Rev. Code, §3313.48. [21] As an entitlement conferred by state constitution and statute, the right to attend the public schools of Ohio is, under the decisions of this Court, a "property" interest protected by the Due Process Clause of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Certainly, a free public education guaranteed by statute is one of the most important values dispensed by the government to the individual. The right to a public education is an essential prerequisite to earning a living and functioning in modern-day society. [22]

Statutory entitlements of a value to the individual no greater than that of public education have consistently been held by this Court to be protected property rights. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 603 (1972) (college teacher's understanding that continued employment would be provided absent "sufficient cause"); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (continued possession of a driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (statutory right to continue to receive welfare benefits). Moreover, in *Goldberg v. Kelly*, this Court, relying on *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S.

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[21] With the exception of South Carolina and Mississippi, every state has a constitutional provision directing the establishment of a system of free public schools. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 112 n.69 (1973) (Marshall, J., dissenting).

[22] For the pecuniary advantages of public education, see p.14, *supra*.

930 (1961), recognized in dictum that the right to attend a public college is a protected property right within the meaning of the Fourteenth Amendment. 397 U.S., at 262 n.9.

Appellees in this case have a constitutionally protected liberty, as well as property, interest in continuing their public education free from arbitrary interference. This Court has consistently held that the right of a parent to educate his or her child,[23] and the implicit right of the child to be educated, are constitutionally protected liberties.[24] *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Appellants, in their Brief on the Merits, argue that even though the abstract right to learn is a "liberty" within the meaning of the Fourteenth Amendment, the right to a public education is not. The decisions of this Court do not support any such distinction. On the contrary, in each of the above-cited cases, the Court upheld the right

[23] Although in some situations the rights of parents to educate their children and the rights of children to be educated may conflict, in this case they do not. School suspensions conflict with the rights of both the parent and child who desire that the child remain in school. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court refused to differentiate between a parent's right to educate his child and the child's substantive right to a public education because there was no evidence that the children expressed different desires from their parents concerning public school attendance.

[24] In determining whether an interest is a liberty, this Court has considered the criterion of whether the deprivation of the interest resulted in a stigma to the individual's reputation or foreclosed his opportunities. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). In practicality, a suspension from public school results in both. The consequences of a suspension are discussed *supra* at pp.10-16.

of the child to attend a particular school or study a particular course at the school. In *Meyer v. Nebraska*, the Court upheld the student's right to obtain instruction in foreign languages in public schools. In *Pierce v. Society of Sisters*, the Court upheld the right of the individual to attend a particular private school instead of a public school. In *Bolling v. Sharpe*, the Court upheld the right of school children in the District of Columbia to attend an integrated school system. Thus, the Court's opinions are clear that at least where the state has established a public school system, students have a constitutionally protected liberty to attend those schools. Moreover, even if one accepted Appellants' definition of liberty as the abstract right to educate oneself, the suspension of the students in the instant case deprived them of liberty because the Ohio public school system does not offer the suspended students any alternative means by which to educate themselves.[25] As a practical matter, high school students are dependent on some form of schooling for education; for this age group, unsupervised self-education is a meaningless substitute for formal schooling.

Appellants' reliance on *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), for the proposition that public education is not a protected liberty or property within the meaning of the Due Process Clause of the Fourteenth Amendment is misplaced. As noted by the District Court in the instant case,

[25] The mere fact that suspension is a temporary, rather than permanent, deprivation of the student's educational rights is irrelevant to the due process question. When a temporary deprivation results in real and irreparable harm, as here, it is settled that due process principles apply to the state's action. *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

> [t]he Supreme Court's holding that the right to an education is not explicitly or implicitly guaranteed by the Constitution does not affect the determination of whether it is a liberty or property which cannot be interfered with by the State without the protection of due procedural safeguards. [I]nterests included within the concepts of liberty and property are often rights created by the State which have no Constitutional status. [Appellants' Jurisdictional Statement at 57 (Appendix B).]

See also Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), in which the Court said that the question of whether ". . . summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment . . . cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.' " *Id.* at 894; *accord, Wieman v. Updegraff*, 344 U.S. 183 (1952).

B. The Student's Interest in Being Protected from Arbitrary and Unfair School Suspension Clearly Outweighs the State's Interest in Summary Disciplinary Procedures.

We have demonstrated above that Fourteenth Amendment due process principles apply to this case, since suspensions from public school affect students' constitutionally protected liberty and property interests. Those principles demand that the state accord students a hearing *prior* to suspension, because the possibly irreparable injury

to the student caused by suspension far outweighs any interest which the state might have in summary suspension procedures.[26]

In determining whether in a given situation due process requires a hearing prior to the state's deprivation of a citizen's liberty or property, this Court traditionally has utilized a balancing test. The Court has weighed whether the state's interest in deferring or foregoing a hearing overcomes the individual's interest in being protected from arbitrary and possibly mistaken action. *See, e.g., Arnett v. Kennedy*, 42 U.S.L.W. 4513, 4531 (U.S., 1974) (Powell, J., concurring); *Goldberg v. Kelly*, 397 U.S. 254, 263-66 (1970).

Appellants' assertion that the state must provide a hearing only if the citizen will suffer "grievous loss" is unsupported by any decision of this Court. While Appellants are correct that some opinions have noted that grievous loss might follow arbitrary state action, in each case the Court cited the large potential loss as relevant to a balancing process, and not as an absolute threshold standard. *See Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court sharply dismissed the argument that due process should attach only to a deprivation of "necessary" items. It said that to read *Goldberg v. Kelly* in such a manner would mark "a radical departure from established principles of procedural due process." 407 U.S., at 88.

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[26] Of course, a showing by the state of a *bona fide* emergency situation at the school might justify some departure from procedural regularity until the crisis had passed. Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1074-75 (1969). No such situation has been alleged in the instant case, however.

Nevertheless, by whatever standard one chooses to measure loss, the harm of a suspension to a student, particularly a minority student, is in fact grievous. As discussed at pp.10-16, *supra*, suspension can result in incalculable educational, as well as psychological, damage. This has been recognized by numerous lower courts which, like the court below, have required public schools to hold hearings prior to suspensions.[27] *See, e.g., Sullivan v. Houston Independent School District*, 475 F.2d 1071, 1072-73 n.3 (5th Cir.), *cert. denied*, 94 S. Ct. 461 (1973) (refusal to vacate injunction requiring notice and "formal hearing" for suspensions of more than three days); *Black Students v. Williams*, 470 F.2d 947 (5th Cir. 1972) (students must receive hearing prior to ten-day suspension); *Vail v. Board of Education*, 354 F. Supp. 592 (D.N.H. 1973) (consultation must precede any suspension and formal hearing must precede suspension for more than five days); *Givens v. Poe*, Civil No. 2615 (W.D.N.C., Nov. 1, 1972), *implementing* 346 F. Supp. 202 (W.D.N.C. 1972) (requiring for all suspensions of ten days or less written notice and hearing at which student can present witnesses); *Mills v. Board of Education*, 348 F. Supp. 866, 878 (D.D.C. 1972) (hearing ordered prior to suspension

[27] The distinctions between the detrimental effects of an expulsion, an indefinite suspension, and a shorter suspension are distinctions of degree only, and due process protections are not dependent on the number of days of suspension. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). On the other hand, there are lesser sanctions than suspensions, such as after-school detention and the award of demerits, which are so minor and have such minimal effect on the student's education and opportunities that a hearing may not be required. *See, e.g., Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972) (in which the court indicated in dictum that a hearing would not be required prior to an award of demerits provided that demerits did not accumulate to the point of endangering the student's enrollment).

for any period over two days); *Stricklin v. Regents of University of Wisconsin*, 297 F. Supp. 416 (W.D. Wis. 1969), *appeal dismissed*, 420 F.2d 1257 (7th Cir. 1970) (specification of charges, notice of hearing, and hearing must precede 13-day "interim" suspension); *Mello v. School Committee*, Civil No. 72-114 (D. Mass., Apr. 6, 1972) (court restrained any exclusion from school prior to adequate hearing).

Appellants assert that the interest of the schools in taking summary action to suspend a student is to preserve order and discipline and that it is not feasible to provide hearings on the merits of suspensions. Yet Appellants have failed to explain how, and to what extent, according hearings would interfere with the preservation of order and discipline,[28] and it is difficult to understand how providing hearings on school suspensions is less feasible than providing hearings prior to termination of welfare benefits, as required by *Goldberg v. Kelly*, 397 U.S. 254 (1970). The cost to the school system of providing hearings prior to suspension is minimal – slightly increased expense and demands on staff time.[29] In almost all cases, school officials can prevent any interruption of the educational process by holding hearings after school hours.[30]

[28] The provision of fact-finding hearings prior to suspensions might actually aid in preserving order and discipline by isolating the students who are, in fact, the "troublemakers" rather than suspending the mistakenly accused.

[29] *See generally Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (states must bear the costs of providing procedural due process, since "the Constitution recognizes higher values than speed and efficiency").

[30] Amici have been advised that the Amicus Brief to be filed by the Children's Defense Fund will address itself in detail to the issue of cost to the school system of providing hearings.

This Court has held, with regard to desegregation, that disruption in the schools could not justify depriving students of their constitutional rights. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). Interference with a student's right to uninterrupted education is valid only if the school authority sustains the burden of showing that it acted reasonably to prevent substantial disruption or material interference with school activities. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970). Moreover, even if the school system can show disruption or interference with school activities, it must also sustain the burden of demonstrating that it is unreasonably difficult to hold a hearing prior to a temporary suspension. *Stricklin v. Regents of University of Wisconsin*, 297 F. Supp. 416, 420 (W.D. Wis. 1969), *appeal dismissed*, 420 F.2d 1257 (7th Cir. 1970). In an emergency situation, the balance of interests might shift, so that the school system would be required to provide a hearing after the deprivation, but as early as possible. If the state sustains its burden of showing that

> . . . it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process requires that he be provided such a preliminary hearing at the earliest practical time. [*Id.; accord, Pervis v. LaMarque Independent School District*, 466 F.2d 1054 (5th Cir. 1972).]

In determining when it is impossible or unreasonably difficult to provide a student with a hearing prior to a suspension, the balance should be struck in favor of providing the hearing, even if it is necessary to reduce the formality of the hearing to do so. As the interruption of the student's education and the collateral consequences of the discipline become less severe and the burden to the school system in holding the hearing increases, the formality and procedural requirements of a hearing could be reduced. *See Board of Regents v. Roth*, 408 U.S. 564, 570 n.8 (1972). But the hearing accorded a suspended student never should be dispensed with altogether.

CONCLUSION

The issue in this case is two-fold: 1) whether due process requires any hearing on the merits of a suspension from public school for up to ten days; and 2) the timing of the hearing. The Court should be mindful that the resolution of these issues will have great impact, not only on a small group of students in Ohio, but on public school students throughout the country. The available evidence of disproportionate suspensions of Black students suggests that there is serious risk of racial discrimination in school disciplinary proceedings. A hearing prior to suspension is essential to guard against the risk of such arbitrary action.

Respectfully submitted,

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